No. 14142

In The United States Court of Appeals For the Ninth Circuit

THOMAS M. ROBINSON, Collector of Internal Revenue for the District of Montana,

Appellant

v.

NOEL ANDERSON,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLEE

VERNON E. LEWIS,
Attorney for Appellee
Fort Benton, Montana

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OPINION BELOW

The opinion of the District Court (R.22-30) is reported at 115 F. Supp. 776.

JURISDICTION

This appeal involves federal income taxes for the year 1945 in the amount of $10,292.84 which was paid by the taxpayer on November 10, 1949. (R. 32.) A claim for refund was filed on or about November 24, 1949 (R. 7), and was rejected by notice dated April 14, 1950 (R. 32). Within the time provided in Section 3772 of the Internal Revenue Code and on September 8, 1950, the taxpayer brought this action in the District Court

for recovery of the taxes paid. (R. 11.) Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. The case was tried by the Court without a jury. (R. 34.) The judgment was entered on June 30, 1953. (R. 35.) Within sixty days and on August 27, 1953, a notice of appeal was filed. (R. 35-36.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTION PRESENTED

Whether the findings of the District Court "that the plaintiff, Noel Anderson, Agnes Anderson, Noel J. Anderson and Robert M. Anderson joined together as partners in good faith in the months of December of 1944 and January of 1945 for the purpose of conducting a farming, ranching and livestock business in Chouteau County, Montana, that said partnership conducted said operations during the entire year of 1945 and that each of the members of said partnership shared in said operations and the profits thereof," is clearly erroneous.

STATUTES AND RULE INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or

profits and income derived from any source whatever. * * * (26 U. S. C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. (26 U. S. C. 1946 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him - * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b). (26 U. S. C. 1946 ed., Sec. 182.)

"PARTNERSHIP AND PARTNER. The term partnership includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation, and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization." Sec. 3797 (a) (2) of the Internal Revenue Code and Sec. 1111 (a) (3) of the 1932 Act.)

FEDERAL RULES OF CIVIL PROCEDURE:

RULE 52. FINDINGS BY THE COURT

(a) Effect. * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. * * *

STATEMENT

The Apellant in his statement beginning on page 3 of his Brief has omitted some important facts and misinterpreted others so

that we feel that a further statement is necessary. The statement beginning with the last paragraph on page 3 is not a complete statement of the particular fact involved therein. The fact is that the care, harvesting and marketing of the 1944 crop, only, was handled under the name of A. E. Anderson & Son by agreement between the taxpayer, his mother, and sister. (R. 62.) Any operations in 1944 for the 1945 crop were conducted by the new partnership. (Appellant's Brief 3-5) (R. 71.)

On page 5 of his Brief, Appellant states, referring to the Anderson boys, that "they were to be given their necessary expenses for support and education". They were not "*given*" their necessary expenses, the boys had the right to draw necessary expenses for their needs and education all of which amounts so drawn were chargeable against their respective accounts in the partnership. (R. 234 and 264.)

Appellant states on page 5 of his Brief that "the wife helped with the cooking and minor chores". This is not a correct statement of the facts. At no place in the testimony was there a reference to "MINOR farm chores". Actually her work consisted not only of milking cows but driving tractor and truck, hauling grain, poisoning grasshoppers and pulling hay up on the stack, day after day. (R. 45, 46, 194-197)

On page 6 of his Brief, Appellant states, referring to Noel J. Anderson, "in September of 1946, he returned to college and remained there for the school year 1946-1947". This is not a fact. Noel J. Anderson attended the first two quarters, only, of

the school year 1946 and 1947 and returned to the ranch in time for the spring work in 1947. (R. 222.)

On page 7 of his Brief, Appellant states that "all dealings in wheat and livestock DERIVED from the ranch during 1945 were handled in the name of A. E. Anderson, the deceased father". This is not true for the reason that a large part of the wheat grown in 1945 was not sold until the spring of 1946 and when it was sold, it was sold in the name of Noel Anderson & Sons. (Ex. 25 and 26 and R. 113, 114, 157.)

On page 8 of Appellant's Brief, Appellant states that the individual income tax returns for 1945 of Noel, Jr., and Robert were signed by Noel Anderson. The statement gives no reason for this action on the part of Noel Anderson. The facts are that the reason Noel Anderson signed his sons' names by him, to the 1945 returns was that at that time, the law required that the returns be made by January 15th. Noel J. Anderson was on his way to the Pacific at that time and there was no opportunity for him to sign a return. Robert M. Anderson was in college 200 miles away from the Anderson ranch and the time allowed for the filing of the returns was not sufficient to send the return to Robert M. Anderson to sign and get it back for filing within the time required by law. (R. 144, 145, 220.)

APPELLEE'S FURTHER STATEMENT

In addition to the statement given in Appellant's Brief, the following summary of facts is essential to a proper consideration of this case.

Noel Anderson began farming with his father on the lands

involved herein in the year 1917. In 1935, he and his father, A. E. Anderson formed a partnership for the purpose of engaging in farming and livestock operations on the ranch located in Chouteau County, Montana. The first federal partnership return was filed in 1935 or 1936 (R. 42). All of the Federal income tax returns from 1941 on were audited by the Bureau of Internal Revenue and the partnership of A. E. Anderson & Son was approved by the Bureau (R. 49). The joint account of Noel and Agnes Anderson was started in the Chouteau County Bank in 1941 (R. 44). Their share of the earnings from the old partnership during the entire period and up to the date of the death of A. E. Anderson were deposited in this joint account (R. 44). Agnes Anderson, the wife of the plaintiff, and the two boys, Noel J. and Robert M. worked in the old partnership. Agnes cooked for the hired help, drove truck and tractor and worked in the field in the haying operations (R. 45, 46, 194-197). The farming operations for the 1944 crop began in the spring of 1943 and this crop was seeded and growing at the time of A. E. Anderson's death (R. 47-48). After the death of A. E. Anderson, a federal estate tax return was filed in which the entire interest in the Kingsbury land was returned as the property of the deceased and all other property in connection with the farming and ranching venture was returned as one-half only owned by A. E. Anderson. This return was audited by the Bureau of Internal Revenue and so far as the partnership was concerned was accepted without any change whatsoever. (R. 49.)

The validity of the partnership of A. E. Anderson & Son

for tax purposes or otherwise has never been questioned by the Bureau of Internal Revenue. (R. 43.) It had been a common practice for the partnership to hold over wheat in storage from one year to the next (R. 50) and considerable wheat belonging to the old partnership was on hand at the time of the death of A. E. Anderson. During the period from the date of the death of A. E. Anderson thru the closing up of the A. E. Anderson & Son partnership and through the period necessary for the probating of the A. E. Anderson Estate, a considerable period of time elapsed. The partnership could not be closed until sometime in the spring of 1946 and because of the delay in the audit of the federal estate tax return and other matters, the estate could not be closed until the summer of 1946. This has been termed the transition period (R. 62 and 75). During this period, Noel Anderson was conducting the affairs of the old partnership, was supervising the probating of the estate for his mother who was the administratrix and was working with other members of the family in the establishment of the new partnership of Noel Anderson & Sons. (R. 75).

To simplify the accounts, Noel Anderson maintained one bank account of A. E. Anderson & Son and the closing business of the old partnership, part of the receipts of the estate, and the necessary expenses for the first year of the new partnership were handled through this one bank account. (R. 75). There was no money on hand in the new partnership during the season of 1945 with which to pay the expenses. (R. 74.) Noel Anderson had had no training in accounting (R. 75). During this

entire period, the legal title to all of the property involved in this case remained in the name of A. E. Anderson. The payment to the mother for her share in the property of the A. E. Anderson Estate was made by check drawn on the joint bank account of Noel Anderson and Agnes Anderson (R. 64) and the payment to the sister for her share of the property of the estate was made by check for $4028.28 drawn on the joint bank account of Noel Anderson and Agnes Anderson (R. 64) and by a check for $5000.00 drawn on the account of Noel Anderson & Sons (R. 65), the reason being that there was not sufficient funds in the joint account at the time to pay the entire amount. However, the sum drawn on the Noel Anderson & Sons account was charged to the account of Noel and Agnes Anderson and appears as the second item on Plaintiff's Exhibit 12 H.

The testimony of Noel Anderson, Agnes Anderson, Noel J. Anderson and Robert M. Anderson, all show that the agreement to form a new partnership under the name of Noel Anderson & Sons was made at a family conference during Christmas week of 1944. The new partnership had been planned since April of 1944. (See the partnership return, a part of Ex. 24) (R. 109, 53, 55, 56, 57, 199, 262). The details of this partnership, though verbal, were fully worked out at this conference. Noel Anderson and Agnes Anderson had agreed between them that the property coming to them from the A. E. Anderson & Son partnership and the A. E. Anderson Estate should be owned in equal shares (R. 61). The boys had worked on the farm during the entire season of 1944 and the only wages they had received

was the pay for helping to harvest the 1944 crop which was the property of the A. E. Anderson & Son partnership. They both worked in the preparation of the seeding of the crop for 1945 during the season of 1944 amounting to 1100 acres, doing most of the work including all of the seeding, (R. 51 and 242). And the crop growing on January 1, 1945, was included in the assets of the new partnership. The operations on the ranch were started under the new partnership right away after January 1, 1945 (R. 71). The accounts of the new partnership were kept separate from the accounts of the old partnership and of the estate. The new partnership accounts were kept in a cash book (Ex's. 9 A,B,C,D, and E) and the ledger accounts of the respective partners were kept in a separate book (Ex's. 12 A,B,C,D,E, F,G,H,I, and J) which were received in evidence without objection (R. 99). Noel Anderson had been an active partner in the partnership of A. E. Anderson & Son for a period of nine years. During all of which time all of the partnership property had been in the name of A. E. Anderson and Noel did not consider the name of the new partnership or the use thereof as important during any of the transition period (R. 167-168). The new name of Noel Anderson & Sons came into general use and the new account of Noel Anderson & Sons was started in the Chouteau County Bank on April 30, 1946, which was as soon as the business of the old partnership and the estate had reached the stage to justify the closing thereof. Beginning with the opening of the new account in the Chouteau County Bank on April 30, 1946, all income from the partnership of Noel Ander-

son & Sons and all bills owing by the new partnership were handled through the new Bank account. This account has been maintained continuously and still is maintained as the bank account of the partnership (R. 103). Some of the wheat grown in 1945 was sold in the fall of 1945 but the credits for the sale of this wheat were all entered on the cash account of the new partnership (Ex. 9A). Some of the wheat raised in 1945 was stored on the ranch and in the month of May, 1946, Contracts for sale of the wheat were entered into with the Commodity Credit Corporation (Ex. 25 and 26. R. 113, 114, and 157). This transaction was made under the bonus program of the Government in effect at that time.

The purpose of the ledger accounts and their contents were thoroughly explained by Noel Anderson (R. 94 to 99) and later by each of the two boys. It was distinctly understood that the boys were not to receive the Deeds covering their interests in the real property until their debts to their father and mother were fully paid from their share of the earnings in the partnership (R. 106, 226, and 250). Ex's. 21, 22, and 23 represent the Deeds to Agnes Anderson, Noel J. Anderson, and to Robert M. Anderson for their respective shares in the real property of the partnership, admitted in evidence (R. 106-107).

There was no question of any kind raised by the Bureau of Internal Revenue as to the validity of this partnership until the month of March, 1947 (R. 110). Part of the crop of Noel Anderson & Sons raised in 1945 was sold in 1946 in the name of Noel Anderson & Sons. (Ex. 25 and 26, R. 113, 114 and

157). The proceeds from the cattle sold in the fall of 1945 were deposited in the account of A. E. Anderson & Son but full credit was given for these payments in the cash book of Noel Anderson & Sons (Ex. 9 A, R. 156). The taxes for the year 1945 were charged as expense against Noel Anderson & Sons (R. 159).

DISCUSSION OF APPELLANT'S ARGUMENT

Appellant presents his argument under the following general headings:

"*A. In order for the income to be taxed to the alleged members, the partnership must have existed during the tax year, 1945.*"

"*B. The agreement was to form a partnership in the future, not during 1945.*"

"*C. The formation of the partnership was impossible during 1945 because the taxpayer had not acquired the ranch properties.*"

"*D. The conduct of the parties was inconsistent with the existence of a partnership in 1945.*"

"*E. The taxpayer retained such dominion and control over the property and earnings during 1945 that the income should be taxed to him.*"

"*F. The son, Noel Junior Anderson, was not a partner for tax purposes during 1945 because he was absent in the Army during the entire year and contributed neither capital nor services to the enterprise.*"

"*G. The finding of the District Court that the wife was a partner for federal income tax purposes during 1945 was clearly erroneous since there was no business purpose involved in making her a partner.*"

We will attempt to discuss these questions in order and in the light of the principles laid down in Commissioner vs. Culbertson, 337 U.S. 733, which may be summarized in one sentence as follows:

> "If, upon a consideration of all the facts, it is found that the partners joined together in good faith to conduct a business, having agreed that the services or capital *to be contributed presently* by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient." (Emphasis supplied)

The questions raised under Appellant's divisions A and B may be discussed together.

THE ONLY QUESTION INVOLVED

WAS THE PARTNERSHIP TO TAKE EFFECT IN 1945?

The Appellant has admitted that the Agreement by members of the Anderson family to form a partnership was made in good faith but insists that it was not to take effect in 1945 but "at some future time". (Appellant's Brief 4, 5, and 16.)

The entire defense in this case centers around an attempt to prove that the ranch operations of the Anderson family in 1945 were not conducted in the name of Noel Anderson & Sons and that the property during said year was held in the name of A. E. Anderson. We submit that the partnership name, or the lack of one, or who has the legal title to the property, is entirely immaterial. (Gaspar vs. Buckingham 116 Mont. 236; 153 P.2d. 892).

It was especially unimportant in the thinking of Noel Anderson. The partnership of Noel Anderson & Sons is a direct successor to the partnership of A. E. Anderson & Son. For approximately nine years, Noel Anderson had been a member of the partnership of A. E. Anderson & Son. During all of that period, he owned a one-half interest in the partnership and the partnership property and received one-half of the profits and yet during the entire period all of the property was in the name of A. E. Anderson, personally. Most of the business was transacted in the name of A. E. Anderson and all of the income was deposited in the name of A. E. Anderson in the Chouteau County Bank. In spite of that fact, the Bureau of Internal Revenue recognized the partnership as valid for tax purposes and has never at any time questioned the legality thereof. (R. 43.)

The Appellant insists there was no present transfer of interest to the sons and wife in 1945. He entirely overlooks the fact that all of the farm machinery and equipment and all of the cattle as well as the use of all of the land including the State land was actually in the possession of, and used, by all members of the Anderson family in the year 1944 and during the entire year of 1945 for the purpose of producing the income of this partnership in the year 1945. Exhibit No. I is a statement of the property both real and personal that was turned into the partnership at the time of its formation by Noel Anderson and Agnes Anderson (R. 61). The real estate was listed at $20,410.75, the machinery, equipment and miscellaneous items were listed at $7,904.25, and the livestock was listed at $16,695.00, mak-

ing a total of $45,000.00. Noel Anderson and Agnes Anderson each contributed 1-3 of this, totaling $30,000.00. The two boys agreed to pay $7500.00, each, for a 1-6th interest in the property to be paid from their share of the profits beginning in the year 1945. Exhibit 12-I shows Noel J. Anderson contributed as capital in 1945 the sum of $4566.48 as a payment upon his debt of $7500.00. Exhibit 12J shows that Robert M. Anderson contributed $3711.48 as capital in 1945 being his net payment on his debt of $7500.00.

The court will take note of the fact that the 1100 acres of growing crop was not mentioned or listed in the property to be transferred by Noel and Agnes Anderson to the new partnership (Exhibit I). There was a very good reason for this fact. Each member of the new partnership had contributed to the work involved in the year 1944 toward the growing of that crop and none of them had received any pay of any kind for their work. The Appellant insists that the work of the sons in 1944 was only work that would normally be done by the sons of any rancher and that the work of Agnes Anderson consisted of "minor chores". It is quite apparent that Appellant is not familiar with the farming practice in that part of Chouteau County in which the Anderson ranch is located. The work for the 1945 crop was begun in the spring of 1944 and the cultivating of the ground was continued through the summer of 1944. The cultivated land consisting of 1100 acres was seeded to winter wheat in the month of September, 1944. (R. 71, 72, 218, 239, 242, 254) Noel and Agnes

Anderson had furnished the seed for this crop while Noel J. Anderson and Robert M. Anderson had done the most of the work involved in the cultivating and seeding of the entire 1100 acres, (R. 254) Noel J. Anderson having seeded approximately ½ of the crop. (R. 217). Both boys worked looking after the cattle during the year 1944. (R. 240) Agnes Anderson drove the machinery for the poisoning of grasshoppers on the crop during the year 1945. She cooked for the men during the branding season in the spring of 1945 and again for the harvest season in 1945. (R. 196). She also hauled the wheat fifteen miles to the Loma elevator. (R. 202) Robert worked through the entire season of 1945, branding the cattle, looking after the cultivating of the ground and the seeding thereof for the 1946 crop and he also worked through the entire season harvesting the 1945 crop—all of this work being done before he left to attend college in the fall. (R. 241-242) The care of the cattle by the two boys in 1944 was a direct contribution to the raising of the 78 calves the increase of the cattle herd in 1945 which increase were marketed by the partnership on October 16, 1945, and the proceeds of which appear as an item of income on the third to the last line of Exhibit 9A. All of these services and many more performed by the members of this partnership can hardly be classed as work that the "ordinary ranch sons" might do or "minor chores" to be performed by the wife.

We take no particular exception to Appellant's statement of the law as set forth on page 12, 13, and 14 of Appellant's

Brief. However, we cannot agree with his application of the law to the case at issue. The facts in the case of Lucas vs. Earl 281 U.S. 111, Helvering vs. Clifford 309 U.S. 331, Wisdom vs. U.S. 205 F.2d. 30, and Toor vs. Westover 200 F.2d.713 cited by Appellant are so different from the facts in the instant case that they have no bearing whatsoever except as they might contain a general statement of the law. In the Lucas case, the taxpayer attempted to assign a portion of his salary to his wife and on the basis of that filed a partnership return. In the Helvering case, the question involved a trust set up for the benefit of the members of the family. In the Wisdom case, the taxpayer was a broker acting as selling agent for certain brewing companies. He earned all of the income but attempted to bring his wife and two married daughters into the partnership. The Toor case also involved a trust set up for two of the taxpayer's children as partners. None of these cases are, therefore, in point. There are many cases with similar facts to the case at issue to which we might refer for a statement of the law. Reference to Commissioner vs. Culbertson, 337 U.S. 733, would seem to be sufficient particularly in view of the fact that the facts in the Culbertson case are very similar to the facts involved herein.

> "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower case, but whether, considering all the facts - the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested

persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent - *the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.*"

"If, upon a consideration of all the facts, it is found that the partners joined together in good faith to conduct a business, *having agreed that the services or capital to be contributed presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient.*" (Emphasis supplied)

APPELLANT CLAIMS THAT THE FORMATION OF THE PARTNERSHIP WAS IMPOSSIBLE DURING 1945 BECAUSE THE TAXPAYER HAD NOT ACQUIRED THE RANCH PROPERTIES

This contention is hardly worthy of discussion. Noel Anderson had never had legal title to any property prior to 1945 and he did not have legal title to any of the property during any part of the year 1945. In spite of that fact, he had been the actual owner of a half interest in all of the real property, farming equipment and cattle as a full partner of A. E. Anderson & Son for a period of approximately nine years prior to 1945 and during all of said period he had received one-half of the profits thereon and during all of said period partnership returns together with individual income tax returns were filed by A. E. Anderson and Noel Anderson which partnership returns had been audited by the Bureau of Internal Revenue and had been

recognized by said Bureau as valid for tax purposes. If we carry Appellant's contention to a logical conclusion, since Noel Anderson had no title to the property involved in 1945, he could not be taxed with the income from said property. Under such an argument, the Culbertson boys involved in the Culbertson case, supra, could not have shared as partners in their ranching operations for their interests were not paid for during the years involved and they held no title to the property, yet in spite of that fact, the Court of Appeals in the final decision in this famous case held the boys to be full partners. Culbertson vs. Comm. (5th) 194 F.2d. 581.

Regardless of who held the legal title to the property—the real estate, farming equipment and the cattle—the fact remains that this property was turned over to the members of the new partnership as soon as it was formed and this property was used by all members of the partnership in the production of the income for 1945. The growing crop toward which all members of the family had contributed labor in 1944 became a part of the assets of the new partnership immediately upon its formation. It seems unnecessary for us to pursue this argument further.

APPELLANT INSISTS THAT THE CONDUCT OF THE PARTIES WAS INCONSISTENT WITH THE EXISTENCE OF A PARTNERSHIP IN 1945

The answer to this contention is that the name under which the partnership operated or the question of who was the legal owner of the property are absolutely immaterial. The important

question is who actually conducted the farming operations and who earned the income? Appellant makes reference to the State land leases (Appellant's Brief 21). A reference to Exhibits 28 and 29 will show that the leases were made in 1943 for a ten year period in the name of A. E. Anderson; the formal written assignments were made in March of 1947, which, by the way, was before any audit had been made of the Noel Anderson & Sons partnership by the Bureau of Internal Revenue. The land included in these leases was turned over to the new partnership for farming purposes along with the other property on January 1, 1945. The fact that the formal assignment was not made until March, 1947, has no bearing upon the question of the validity of the partnership. The rentals for these State lands for the year 1945 were paid by the new partnership and charged on the partnership expense account. (Exhibit 9B). Appellant (his Brief 21) states that the conservation contracts with the Federal agencies were entered into during the year 1945 in the name of the former partnership—ignoring the fact that the A.A.A. office, as was the custom, followed the record title of the land involved. However, again the important thing is, who paid for the services rendered? A reference to Exhibit 9D, entry on the fourth line from the bottom of the page, shows that the dam constructed under these plans was paid for by the partnership and charged in the expenses on the partnership returns. Appellant, in his Brief 21, comments upon the fact that the bank account remained in the name of A. E. Anderson & Son during the year 1945. Where the money was actually deposited is of

little moment so long as the books of the partnership show an account thereof and in this connection we call the Court's attention to the item of net income of the partnership for 1945 as shown by Exhibit 10. This amount is $21,599.78. Exhibit 12, the partnership ledger, shows the charges made for payment of income taxes both Federal and State for the year 1945 which, of course, were paid early in the year 1946. The aggregate amount of these taxes is $9411.52. When this amount is deducted from the net income of the partners, we have the sum of $12,168.26 which is approximately the same amount that was carried over to the bank account of Noel Anderson & Sons on April 30, 1946, from the account of A. E. Anderson & Son (Exhibit 38; Appellant's Brief 33). The important fact in this connection is that upon the opening of the new partnership account, the balance on hand as shown by the partnership books was transferred to the new account. Appellant mentions the fact that the real estate taxes were paid in the name of A. E. Anderson & Son. The court will take judicial notice of the fact that taxes are levied in the name of the person who holds the legal title to the property. Of course, during 1945, the estate of A. E. Anderson had not yet been closed and naturally the taxes would be assessed in the name of A. E. Anderson. However, the important question is, who paid the taxes? The entry of November 1st, Exhibit 9E, shows that the taxes both real and personal for 1945, were paid by the new partnership and charged to partnership expense. Appellant further comments upon the fact that the cattle brands were not assigned to the new partnership until

1951. Again we submit that the question of the registered owner of the brand has no bearing in view of the fact that Exhibit 9A, the item for October 16th shows the entry of income of the sum of $3952.24 for the sale of 78 calves which were the increase of the cattle for 1945.

Appellant, in his statement on page 21 of his Brief, infers that all of the wheat raised in 1945 was sold in the name of A. E. Anderson & Son. Again the partnership record Exhibit 9A, the items for August 21, 1945, to September 10, 1945, show the sale of wheat aggregating $28,159.81 which, of course, is a credit of this amount on the books of account of Noel Anderson & Sons. This, by the way, is the exact amount of income from the payment of grain as shown on the first part of Schedule 1040F - a part of Exhibit 10, the income tax return for 1945.

While we realize that the objections made in this connection by the Appellant constitute almost his complete defense in this case, yet we insist that none of these points are important in determining whether the partnership was actually formed and in operation in 1945. In the case of Gaspar vs. Buckingham, (supra), the Montana Supreme Court had before it the question of a partnership between two brothers. The two brothers had pooled their savings, leased land in the name of the older brother, purchased livestock and branded it with the brand recorded in the name of the older brother, deposited the funds belonging to the livestock operation in the name of the older brother and had conducted all of the business in the name of the older brother. After the older brother's death, the question of whether

there was a partnership came into the Courts for decision. In deciding in favor of the validity of the partnership, the Court said:

> "Existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. * * * The existence of the partnership may be implied from circumstances. * * * Where from all of the evidence it appears that the parties have entered into a business relation combining their property, labor, skill and expenses or some of these elements on the one side and some on the other for the purpose of joint profits, a partnership will be deemed established."—Gaspar vs. Buckingham, 116 Mont. 236, 153 P.2d. 892.

The question is, whether the members of the partnership of Noel Anderson & Sons following the intention shown in the partnership agreement of December, 1944, did in due course acquire the property and conduct the farming and ranching venture as a partnership and the events occuring in the years following may be taken into consideration in determining the true intent of the parties. (Harkness vs. Comm. 193 F.2d.655.)

APPELLANT ASSERTS THAT TAXPAYER RETAINED SUCH DOMINION AND CONTROL OVER THE PROPERTY FOR EARNINGS DURING 1945 THAT THE INCOME SHOULD BE TAXED TO HIM

We do not think that the evidence bears out this contention:

1. Investments made in new farm machinery, additional land, and decisions on other matters of general policy were only made

after family conferences in which all members of the partnership took part. (R. 203, 226-228, 256, 257.)

2. Mrs. Anderson could at all times, and did write checks in payment of business expenses. There was no working capital in the new partnership and of necessity the expenses for 1945 were in part, at least, paid from the joint bank account of Noel Anderson and Agnes Anderson, some of the expenses being paid by checks written by Agnes Anderson. (R. 205)

3. Noel J. Anderson and Robert M. Anderson could at all times and did draw whatever portion of their share in the profits as was necessary to to meet their needs, including spending money. (R. 234, 264)

4. At the end of the 1945 year, each member of the partnership was credited on the books of the partnership with his or her full share of the net income. (R. 94-99)

5. A large part of the 1945 crop was sold under written contract to the government and the contract was signed by Noel Anderson & Sons. (R. 114)

6. The net income remaining in the account of A. E. Anderson & Son was transferred to the account of Noel Anderson & Sons when that account was opened April 30, 1946. (Exhibit 38; Appellant's Brief 33). Appellant states that Noel Anderson retained "the full enjoyment of all the rights which previously had accrued to him from the property". (Appellant's Brief 25). Of course, the record shows that Noel and Agnes Anderson had a one-half interest only in the property under the old partnership. Immediately upon the formation of the new partnership,

Noel Anderson became the owner of one-third, only, and Agnes Anderson the owner of one-third. Noel Anderson was in poor health and his duties during 1945 were largely supervisory while the other members of the partnership performed most of the labor. The taxpayer did not retain full control over the farming operations during 1945.

APPELLANT INSISTS THAT THE ABSENCE OF NOEL JUNIOR ANDERSON IN THE ARMY IN 1945 PRECLUDES HIS ENTRY INTO THE PARTNERSHIP.

Appellant cites Comm. vs. Culbertson, 337 U.S. 733, as authority for this contention. As the Court recognizes, the facts in the Culbertson case are very similar to those in the instant case. Similarity was pointed out by Judge Pray in the decision of the Court below but apparently Appellant has overlooked the final decision in this case 194 F.2d. 581. In this final decision, the Court said:

> "For the reasons stated in and upon the authority of Culbertson vs. Comm. 5th Cir. 168 F. 2d. 976 and Comm. vs. Culbertson 337 U.S. 733; 69 S.Ct. 1210; 93 L. Ed. 1659, the decision and judgment of the Tax Court is reversed with directions to disallow the deficiencies."

In the first Court of Appeals decision, 168 F.2d. 976, the Court said:

> "The fact that the boys were called into military service by the United States as well as the fact that some of them had not, during the tax period, completed their education so as to devote their full time and attention to the partner-

ship is in no wise indicative that the partnership was formed for the purpose of dividing the family income, or for the purpose of income tax savings. The failure by a partner to render service to the partnership or to contribute capital originating with him is, after all, but a circumstance to be considered in determining the reality or actuality of an alleged family partnership". * * *

"Moreover a partnership is formed to act in the future and not in the past when it is fully expected, intended, and agreed that the incoming partner will render services to the partnership, the Government should not be heard to say, 'I will not recognize you as a partner even though you in good faith entered into it. I took you into the Army to fight a war and you did not perform services for the partnership as you had agreed to do.' "

The facts in this case are much stronger than the Culbertson case. Noel J. Anderson did contribute services which were directly responsible for a large part of the 1945 income. He helped care for the cattle that produced the 78 calves which were sold in 1945 and he worked in the field summerfallowing, cultivating and seeding one-half of the large crop of 1100 acres that yielded so well in 1945. The fact that Noel J. was not on the farm during any part of 1945 does not affect his right to be considered a full partner.

"Neither statute, common sense, nor impelling precedent requires the holding that a partner must contribute capital or render services to the partnership prior to the time that he is taken into it. These tests are equally effective whether the capital and the services are presently contributed and rendered or are later to be contributed or to be rendered." —Culbertson vs. Comm. 168 F.2d. 976.

APPELLANT CLAIMS THAT INCLUDING THE WIFE IN THE PARTNERSHIP FOR 1945 SERVES NO BUSINESS PURPOSE

Mrs. Anderson was made a partner for several reasons among which are:

1. She owned an undivided one-half interest in all of the property that went into the partnership. The partnership could not have operated had it not been for her capital investment.

2. She had been contributing vital services to the old partnership and she continued to take an active part and to contribute to the production of the 1945 income by her services in both 1944 and 1945.

3. She took an active part in the partnership conferences and helped to determine the policies under which the partnership operated.

ARGUMENT

SUMMARY

The contributions of the members of the partnership were substantial and made with a bona fide intent to create a genuine partnership.

The uncontradicted evidence shows the partnership to be genuine from its inception.

The Family partnership cases applicable to the instant case.

The formation of the partnership was for a business purpose.

Whether the Partnership is genuine is purely a question of fact.

The decision of the District Court is based upon uncontroverted evidence corroborated by disinterested witnesses.

Conclusion—Were the Findings of Fact of the District Court clearly erroneous?

THE CONTRIBUTIONS OF THE MEMBERS OF THE PARTNERSHIP WERE SUBSTANTIAL AND MADE WITH A BONA FIDE INTENT TO CREATE A GENUINE PARTNERSHIP

The contributions of Agnes Anderson, Noel J. Anderson and Robert M. Anderson may be summarized as follows:

Agnes Anderson performed substantial services for the old partnership, cooking, driving truck, tractor, and driving haying machinery (R. 45, 46, 195, 196 and 197.).

Noel Anderson had always considered that his wife, Agnes, was entitled to a share of the earnings of the old partnership (R. 61), and Agnes had always claimed such a share (R. 197).

The joint account of Noel Anderson and Agnes Anderson was started in 1941 and all money received from the old partnership was deposited in this account (R. 44).

Agnes Anderson claimed a one-half interest in this account at all times (R. 197) and of course claimed a one-half interest in all of the property both real and personal which was transferred to the new partnership and Noel Anderson recognized that she was an owner of one-half of this property (R. 61).

The money was paid for the share of Aleta P. Anderson and Selma I. Finney's share in the estate land, cattle and farm equip-

ment, from the joint bank account of Noel Anderson and Agnes Anderson (R. 64 and 65).

Agnes Anderson performed vital services for the partnership in 1945. She cooked for a crew of fourteen men for branding in 1945 (R. 202, 203, 241 and 251). She hauled wheat, went to town for supplies and repairs, drove truck for scattering grasshopper poison, baled straw and worked a full day with the men (R. 195, 196, and 197). This was not casual work but occurred day after day (R. 196).

During the entire period since the formation of the new partnership, Agnes Anderson has written checks on the partnership account for business purposes. (R. 205). She was familiar with the accounts (R. 204), made some entries in the books (R. 204), and agreed to the purchase of Government bonds in their joint names (R. 208).

The contributions of Noel J. and Robert M. Anderson may be summarized as follows:

These boys had worked on the farm diligently from the time they were able to ride a horse or drive a tractor which began in the year 1938 or when they were twelve years old (R. 215, 218, 237, and 238). Because of their contribution in building up the property in the old partnership (R. 216, 218 and 137), the plaintiff made possible their entry into the new partnership under very reasonable terms (R. 137).

These boys prepared the ground and did all of the summer-fallowing and seeding of 1100 acres in 1944 for the 1945 crop which was the first crop raised by the new partnership (Noel's

testimony R. 71 and 72) (Noel J.'s testimony R. 216, 217 and 218) (Robert M.'s testimony R. 238, 239, 240, 241, and 254). They were not paid wages for any of this work (R. 232 and 236). They cared for the cattle in 1944 (R. 218).

Robert continued the work in 1945 doing part of Noel J.'s work as well as his own (R. 201, 240, 241, 242, 243, 244, 254). Robert's work in 1945 consisted of branding, summerfallowing, cultivating the ground through the summer, harvesting the 1945 crop, seeding the crop in the fall of 1945 for 1946. He worked with the cattle, riding and otherwise.

Maurice Farrell testified of the work of Noel J. Anderson (R. 81) and Ted Ritland testified from personal knowledge of work done by both boys in the field, caring for cattle, and doing all kinds of farm work (R. 181 and 182).

Since Noel J.'s return from the military service in January of 1946, he has spent all of his time working on the ranch except two quarters of college in the fall and winter of 1946 and 1947 all of which was spent as a partner in the partnership of Noel Anderson & Sons (R. 222) and the operations on the ranch have been carried on under the terms of the partnership agreement each year since the year 1945 and in each year, Agnes and the two boys, except for such time as they were in the military service, have performed important and necessary services (R. 225).

The boys have been permitted to draw a portion of their earnings in the partnership at all times since the partnership began. The withdrawals were limited to necessary expenses until their

respective shares in the partnership were fully paid. From that time on there have been no restrictions in the amount that they could draw up to their respective shares. (R. 234).

THE UNCONTRADICTED EVIDENCE SHOWS THE PARTNERSHIP TO BE GENUINE FROM ITS INCEPTION

This evidence may be summarized as follows:

The discussion by Noel Anderson with his attorney in October, 1944, and the definite verbal agreement entered into during the Christmas week of 1944 (R. 60, 61, 199, 200, 201, 219, 220, 244, 245, and 246).

Noel J. agreed to the partnership when he was home on furlough in January of 1945 (R. 202, 219, 220). Robert M. Anderson agreed to the terms which were outlined in detail in his testimony (R. 244-245).

The federal income tax returns (Ex. 10 and 24).

The entries in the cash book (Ex. 9 A, B, C1, D. and E).

The ledger accounts of each member of the partnership (Ex. 12 A to J inclusive). These Exhibits show the complete record of the shares of each partner in the partnership earnings and the exact amounts drawn by each from the beginning of the partnership, January 1, 1945 and through the year 1950.

The fact that all banking business has been transacted under the name of Noel Anderson & Sons continuously from April 30, 1946 (R. 103).

The Deeds for their respective interests in the real property executed and delivered to Agnes, Noel J. and Robert M. (Ex's 21, 22 and 23, R. 104, 226, 250).

The fact that all of the details of the partnership had been set up and had been carried on for a period of more than two years prior to any question being raised by the Bureau of Internal Revenue (R. 110), the first audit being made in March, 1947.

The fact that the check to pay the deficiency assessment in income tax against the plaintiff which is the subject of this action was drawn on the account of Noel Anderson & Sons (Ex. 27, R. 119).

The fact that the State land which had been under lease to A. E. Anderson individually before his death was immediately turned over to the new partnership for its use and that said lands have been grazed and cultivated by Noel Anderson & Sons since January 1, 1945 (R. 119, 120) and that the State land leases dated February 28, 1943, were assigned to the new partnership in the regular course of the business of the partnership. (Ex. 28 and 29).

The fact that the 1945 taxes were charged to Noel Anderson & Sons (R. 159).

The testimony of Ted Ritland, a disinterested witness who has lived most of his life on lands adjoining the Anderson ranch (R. 179). (We call the Court's attention to an error by the reporter in the spelling of Mr. Ritland's name. The correct spelling is "Ritland" instead of "Ritman"). Mr. Ritland knew of the work of Robert M. and Noel J. since the time they were old enough, consisting of seeding, watering and branding cattle, building fences, running and repairing tractors and combines,

summerfallowing and seeding (R. 180, 181). The fact that he had business with Noel Anderson & Sons right after his return from the army in 1945 (R. 182) and that he gave a check to Noel Anderson & Sons for seed wheat which he had purchased from the partnership (R. 182). He knows of the summerfallowing and harvesting that Robert did in the year 1946. The fact that Robert was engaged in seeding the crop up to the time he went to school (R. 182). He also described the field work of Noel J. Anderson done in 1946 from the spring on. This was mechanical work. They were engaged in large scale farming which takes skill to operate and the boys had that skill (R. 184-185). He knew of the cooking that Agnes Anderson did for the old partnership as well as the new—that she helped in haying, in going for repairs, in moving trucks, in pulling hay up on the stack (R. 187, 188).

The further fact that the members of the Anderson family held conferences from time to time to discuss the questions that might come up with reference to the purchase of new machinery or land (R. 203, 226, 227, 228). Also the fact that the boys took an active part in the discussion (R. 228, 256, 257).

The fact that all members of the partnership were very familiar with the books and accounts of the partnership (R. 204, 207, 208, 222, 223, 224, 247, 248, 249, 250). The further statement in Robert's testimony that he observed his father keeping books from time to time and knew that such books were kept in accordance with their agreement (R. 251).

The testimony of both sons as to their work in the partnership

during the entire time that they were home beginning with the year 1944 (R. 217, 218, 222, 242, 243).

The fact that the boys have shared in the earnings of the partnership beginning in the year 1945 (R. 244, 245, 246). That they were not restricted in their drawings after their shares were paid for (R. 234). This is further evidenced by the fact that at the close of the year 1950, Robert M. had actually overdrawn his share by a small amount (R. 102).

THE FAMILY PARTNERSHIP CASES APPLICABLE TO THE INSTANT CASE

The facts in this case place it squarely within the rules laid down by the Courts in a number of family partnership cases.

> "The Court will look through the form to the substance of the transaction to get at the facts, no formal agreement or partnership agreements are necessary"—Eckhard vs. Comm. 182 F.2d. 547.

In Britt's Estate vs. Comm. 190 F.2d. 946, the father and his three children had been engaged in a farming venture. The husband and wife and the three children then verbally agreed to form a partnership. The husband said his wife should be a partner in the farming venture because she had worked in accumulating the property and was still working as hard as the others. The husband was in poor health for a long period before his death. In deciding that the partnership was genuine as to all members, the Court said:

> "Due to the relationship involved and to the conse-

quence which sometimes flow therefrom, purported family partnership agreements should be closely, but fairly, scrutinized. *The approach should be realistic not formalistic.*

Members of a family are as much entitled as anyone else to form business partnerships and such partnerships are entitled to recognition for federal tax purposes so long as they are formed in good faith for business purposes and not merely as a subterfuge to defeat the operation of the tax laws. There is no legal hypothesis in the label "partnership". Courts should, and will, look through the label to the facts that lie beneath. But when the facts square with the label, *the partnership status should not be rejected merely because its constituent members are of the same family.*" (Emphasis supplied)

Appellant insists on applying the arbitrary tests which the Supreme Court discarded in the Culbertson case. The Court of Appeals for the Fifth Circuit in a recent case had this to say:

"If there is anything which emerges with clarity from the decision in the Culbertson case, * * * it is that the artificial and so called objective tests of the existence of a partnership set up in the Tower and Lusthaus cases as conclusive are not such. The question in each case is one of fact to be determined like any other fact question upon the evidence as a whole, and as, stated in the committee reports. The same standards apply in determining the bona fides of an alleged family partnership as in determining the bona fides of other transactions between family members."

"It, therefore, is, and remains true that the acid test for determining the question of the reality and validity vel non of a family partnership is to be found in the answer to the question: *Was the arrangement real, honest and bona*

fide, so that all the ordinary incidents and effects of an agreement of partnership flow, each partner bound by the losses, each sharing the profits, in accordance with his agreement? If the answer is, yes, whatever may be found to be the intent or result tax wise, there was a partnership." Alexander vs. Comm. 190 F.2d. 753. (Emphasis supplied)

In still a later case, the Court of Appeals for the Fifth Circuit in discussing a family partnership case said:

> "It is quite plain that what has happened below here is the same thing that happened in the tax court in the Culbertson case which caused the Supreme Court to say: '* * * that is the vice in the 'tests' adopted by the Tax Court. It assumes that there is no room for an honest difference of opinion as to whether the services or capital furnished by the alleged partner are of sufficient importance to justify his inclusion in the partnership'. In short, the tax court has permitted itself to determine contrary to the agreements of the parties that the amount of capital furnished or the services rendered were not a sufficient consideration under the tax statutes to effectuate the creation of a partnership."—Turner vs. Comm. 199 F.2d. 913.

In the Culbertson case, supra, the taxpayer-father had been in partnership in the cattle business with another man for many years. The partner decided to retire and the taxpayer-father purchased his interest in the partnership. He then sold a one-half interest to his four sons all of whom had grown up on the ranch of the first partnership and had taken an active part in the work of the ranch. When the father sold the one-half interest to the boys, he took their note for the amount and later credited

a payment of a substantial part of the note as a gift to the sons. The two older sons were in the Military Service for a part of the time of the tax years involved. The two younger sons were in school for a portion of the time. It will be readily seen that the facts involved in the Culbertson case and in the case at issue are parallel. In the first decision of the Circuit Court in this case, 168 F.2d. 976, the Court said:

> "Income generally should be taxed to him who owns it. The Culbertson boys owned one-half the cattle that produced the income here."

The Court so held in spite of the fact that the boys had not paid for their share. Likewise, while the Anderson boys had not paid for their share in the partnership during the year of 1945, nevertheless, they were each owners of one-sixth of the cattle and the crop.

In this same decision, the Court went on to say:

> "We do not consider that it is illegal, income-tax-wise or otherwise, for a partnership to be formed in consideration or contemplation of *services rendered or to be rendered*, by the partners." (Emphasis supplied)

And the fact that the services of Noel J. and Robert M. in caring for the cattle and in cultivating the land for seeding the crop in 1944 were before the date of the beginning of the partnership does not nulify the fact that their services were largely and directly responsible for the creation of the income in 1945.

THE FORMATION OF THE PARTNERSHIP WAS FOR A BUSINESS PURPOSE

Noel Anderson's health was not good. He could not continue to carry the load that he had carried in the A. E. Anderson & Son partnership. The entry of the boys into the place of responsibility in carrying on the business was essential. His wife, Agnes, had a one-half interest in their property which was necessary for the successful operation of the Anderson ranch. Her membership in the partnership was clearly for a business purpose. The Court of Appeals for the Fifth Circuit in its first decision, 168 F.2d. 976, went on to say:

> "When the proof conclusively shows that a family partnership was entered into for the *benefit of the business* and not for the purpose of evading, avoiding, or dividing income taxes, it will be deemed a partnership for income tax purposes even as it is recognized in law for all other purposes." (Emphasis supplied)

The Court in this same decision commented further as follows:

> "Neither the Constitution, the statutes, nor public policy requires that partnerships between fathers and sons be outlawed or discouraged. The desire of a partner in any age or clime, with a business that he cherishes and a son that he loves, to have such son with him in his business and to carry it on when he no longer can, was not rendered anathema by the Lusthaus and Tower cases, and aberrations from the salutary rules announced in those cases should not now do so."
>
> "To conclude in this case that the plan and purpose of an aging father to enlist the interest and services of his

> four ranch-reared, experienced and stalwart sons in the carrying on of his and his partner's life work was not for the partnership's benefit seems to require the exaltation of suspicion over the realities to an extent that the exigencies of the times for tax collection neither deserve nor demand."

If we change the words "aging father" in the above quotation to a "father in ill health" and the word "four" to the word "two" referring to the sons, we would have a statement that applies absolutely to the case at issue.

WHETHER THE PARTNERSHIP IS GENUINE IS PURELY A QUESTION OF FACT

> "The finding of fact that there is (or is not) a partnership by the trier of fact (Tax Court or Jury) if supported by the evidence is final"—Davis vs. Comm. 161 F. 2d. 361.

This Court said in Harkness vs. Comm. 193 F.2d. 655:

> "In our opinion, the Court properly interpreted the Culbertson case, the essential determination of which is that the question there considered and presented by the record here is *one of fact.*"

To the same effect is the holding in Toor vs. Westover, 200 F. 2d. 713. *The question of intent is a question of fact*—Ardolina vs. Comm. (3rd) 186 F.2d. 176.

> "The test for determining recognition of a partnership for Federal income tax purposes is whether 'the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise'. *This question is one of fact.*" (Citing Toor vs. Westover, supra,

and Harkness vs. Comm., supra, - Renner vs. U. S. 205 F.2d. 277 at 288).

"The acid test for determining their validity for income tax purposes is to be found in the answer to the question: Was the purported partnership arrangement real, honest and bona fide or was it a mere pretense and a sham? *The question in each case is one of fact* to be determined by the evidence as a whole". - Seabrook vs. Comm. (5th) 196 F.2d. 322. (Emphasis supplied)

THE DECISION OF THE DISTRICT COURT IS BASED UPON UNCONTROVERTED EVIDENCE CORROBORATED BY DISINTERESTED WITNESSES

The clear cut testimony of each of the four members of the Anderson family, especially commended by the decision of the District Court, and the corroborated testimony of Ted Ritland (Ritman) and Maurice Farrell, is ample to justify the conclusion that the *decision was not erroneous.* The evidence submitted by the Defendant does not contradict in any way the testimony of the Plaintiff and his witnesses. The Appellant has sought solely by inference to show that the intention to form a partnership to operate the Anderson ranch was not genuine. For the sake of argument, the Appellee could admit all of the documentary evidence submitted by the Defendant and all the testimony in support thereof and there would still be ample evidence to justify the decision of the Court below.

The Findings of Fact and Conclusions of Law of the District Court "*will not be set aside unless clearly erroneous and due regard shall be given to the opinion of the trial Court to judge the credibility of the witnesses.*"

Gen. Cont. Assn. vs. U. S. 202 F.2d. 633

Schallerer vs. Comm. (7th) 203 F.2d. 100

Forbes vs. C. I. R. 204 F.2d. 777

Russell vs. Comm. (1st) 208 F.2d. 452

Coon River Fuel Co. vs. Comm. (3rd) 209 F.2d. 187

Comm. vs. Culbertson 337 U.S. 733

The rule governing this appeal has been well stated in Pacific Portland Cement Co. vs. Good Mach. etc. Corp, 178 F.2d. 541, as follows:

> "Under the interpretation which the Supreme Court, and this and other Courts of Appeal have placed upon this section, the findings of a trial judge will not be disturbed if supported by substantial evidence. *Full effect will always be given to the opportunity which the trial judge has, denied to us, to observe the witnesses, judge their credibility, and draw inferences from contradictions in the testimony of even the same witness.* (Cases cited). This is the meaning of the provision that findings should not be set aside unless clearly erroneous (Case cited)". (Emphasis supplied)

CONCLUSION

WERE THE FINDINGS OF FACT OF THE DISTRICT COURT CLEARLY ERRONEOUS?

Among other findings the District Court in its decision stated:

1. "There was nothing new or novel about having a family partnership in the Anderson family; the father and son had carried on such a partnership in the name of A. E. Anderson & Son for about nine years, and it was quite

natural to expect that upon the death of the father another family partnership would succeed the old one. *It is generally known that the principal farming operations are carried on in the spring, summer and fall, and the sons were there in 1944 to prepare the soil and put in the crops for 1945, and in 1945 Robert was there to put in crops for 1946, and substitute for his brother, Noel, Jr., who was then in the Armed Services of his country.*"

2. "The Court was much impressed with the appearance of these upstanding young men while testifying, as was also the case in the instance of the parents who preceded them, who have been respected citizens of Chouteau County for many years. After all it's what you believe, as the court remarked during the trial, and now upon a consideration of all the evidence, the court has thus far been unable to find fault in the testimony of members of this family or in their manner of giving it, and finds corroboration in respect to labor they performed in furtherance of their claim of formation of partnership for 1945".

3. "Grave account is made of the fact that transactions are found to have been conducted in the name of A. E. Anderson & Son, A. E. Anderson, Noel Anderson, Agnes Anderson, instead of in the name of Noel Anderson & Sons in 1945. What does the record show? *Importantly it shows the defendant admits good faith on the part of the Anderson family "to create a partnership at some future time*". If good faith is admitted, after hearing the testimony of the Anderson family, and all members thereof declare, and established from their partnership records and other sources, that the partnership was to become effective and was in operation during the year 1945, how can the admission of

good faith be consistently reconciled with a rejection of the evidence on the subject of time when the partnership was established and in operation? The Court believes from the testimony of the Andersons and other living in their neighborhood, and from the records of the partnership, that good faith and honesty of purpose has been disclosed, and that it would be difficult for one with an open mind to note the appearance of those witnesses on the stand and their manner of testifying without being impressed with their sincerity, and at the same time taking into account any self interest they might have in the result."

4. "*It might be said here that there would have been no income or profits for the years 1945 and 1946 had it not been for the services rendered by the four partners as above outlined.*" (Emphasis supplied)

5. "That the formation of a family partnership for the purpose of conducting farming, ranching and livestock operations in Chouteau County, Montana, was discussed and planned by members of the plaintiff's family in the month of April, 1944. That the plan was consummated at a family council held during the latter part of December, 1944, at which time Noel Anderson and his wife, Agnes Anderson, and a son, Robert M. Anderson, made an agreement which was subsequently, namely in the month of January, 1945, ratified by Noel J. Anderson, another son. That said agreement provided for the interest and shares of each member of the partnership. That the said Noel Anderson, Agnes Anderson, Robert M. Anderson and Noel J. Anderson each made substantial contributions to said partnership during the time involved in this action. That Robert M. Anderson and Noel J. Anderson prepared the soil and put in the crops in 1944 for the 1945

crop. That Agnes Anderson supervised the cooking for hired help, drove a tractor and hauled grain during the year 1945 and that Noel Anderson, who was in poor health at the time, assisted in advising and over-seeing the work of his sons. That the farming and ranching operations during the year 1944 and during the entire year of 1945 were carried on by said partnership in good faith and have so continued ever since."

We submit that the decision and findings of fact are based upon uncontradicted testimony and *cannot be considered "erroneous"* and that there is nothing in the record in this case that would leave in the minds of this Court *"a definite and firm conviction that a mistake had been committed"* and that, therefore, the decision of the Court below must be affirmed.

Respectfully Submitted,

VERNON E. LEWIS

Attorney for the Appellee

April 12th, 1954.